Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

DAN COODY,

Petitioner,

v.

THOMSON NEWSPAPER PUBLISHING, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Arkansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an appellate court in a defamation case may undertake independent review of subsidiary or historical facts found at trial and of factual determinations based on credibility.

2. Whether a public official or public figure may prove actual malice largely or exclusively by circumstantial evidence that the defendant "entertained serious doubts" as to the truth of his publication.

3. Whether the actual malice standard should be reconsidered in light of the virtually insurmountable burden that it imposes on public plaintiffs in defamation cases.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioner:

Dan Coody, a citizen of the State of Arkansas.

Respondents:

Thomson Newspaper Publishing, Inc., a corporation organized under the laws of Delaware, d/b/a *Northwest Arkansas Times*;[1] S.D. "Dave" Stokes, a citizen of the State of Arkansas and former publisher of the *Northwest Arkansas Times*.

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[1] The proper name of separate Defendant "Thomson Newspaper Publishing, Inc." is actually Thomson Newspaper, Inc., however the style was maintained throughout the case as Thomson Newspaper Publishing, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dan Coody respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Arkansas in this case.

OPINION BELOW

The opinion of the Supreme Court of Arkansas (App. 1) is reported at 320 Ark. 455, 896 S.W.2d 897.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on May 8, 1995. A timely petition for rehearing was denied on June 12, 1995. (App. 13). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This libel case arose from a heated political campaign in Fayetteville, Arkansas, during the fall of 1992. Petitioner Dan Coody filed suit in the Washington County Circuit Court against Respondents Thomson Newspaper Publishing, Inc., d/b/a *Northwest Arkansas Times*, and S.D. "Dave" Stokes, who was then an employee of Thomson and the publisher of the newspaper.

Coody's complaint was grounded in an editorial and a news story published in the *Times* during the Fayetteville mayoral race. A member of the city's board of directors, Coody sought the mayor's position after citizens approved changing to the mayor-alderman form of government from the city manager form. The race was hotly contested, and Coody was among the front runners. A poll taken the week before the election showed him in the lead.

The first of the two articles was an editorial published on Saturday, October 31 – three days before the election. Bearing the headline "It's time for Coody's facade to come off," the editorial was "signed" by Stokes, a departure from the usual custom at the *Times*, and was not approved in advance by the newspaper's editorial board. Although the *Times* generally did not, as a matter of policy, choose sides in local elections, the editorial was critical of Coody and suggested that he was not fit to be mayor.

In particular, the editorial expressly accused Coody of "attempt[ing] to mislead the public about who he is and what he stands for." It also accused him of having

"set up" a letter-writing campaign aimed at the newspaper and mentioned "rumors" that had been circulating about Coody's past. According to those rumors, Coody had a criminal record and had served time in prison. While the content of those rumors was not specified in the editorial, Stokes wrote that he had previously "supported stories that expose wrong-doing by government and political figures."

Before the editorial appeared, Stokes had hired a private investigator to check into Coody's life in Texas, where he lived before moving to Fayetteville in 1986. The investigator, whose work had not been completed when the editorial was published, found that Coody had no criminal record and described him as "squeaky clean." Coody had previously provided the newspaper with copies of state police reports from Arkansas and Texas indicating that he had no criminal record in either state.

The second article, a news story headlined "*Times* publisher defends probe into past of mayor candidate," was published on election day: Tuesday, November 3. Written by the *Times* reporter who had been covering the mayor's race, the front-page article confirmed Stokes' hiring of a private investigator and the newspaper's "leading role" in investigating Coody's background. Stokes explained that he uncovered some "major discrepancies" in the investigator's report, which "created more questions than it had answered." Stokes also said that the private investigator had "failed to turn up any information on Coody's life between the mid-1970s and 1986, when he moved to Fayetteville."

According to the article, Stokes based his claim of "major discrepancies" on information that he had received from former residents of Beaumont, Texas, who had known Coody in high school. However, Stokes' had only one such source, Kathy Flynn, with whom he spoke after publication of the editorial. During their conversation, she told him that she had no "factual information" about Coody and could provide only her "impressions."

Coody contended that the editorial and the news story implied that he had a criminal record and an otherwise unsavory past, which he was concealing from voters, and accused him of lying during the campaign. In addition, he claimed that the editorial portrayed him as having engaged in unethical political activity, *i.e.*, the letter-writing "set-up." He further asserted that the articles led to his losing the election, caused reputational and emotional injury, and harmed his home renovation business.

In a motion for summary judgment, Thomson and Stokes argued that Coody, a public official, had not mustered sufficient proof of actual malice, as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. (R. 239-61) The circuit judge denied the motion (R. 672-77), and the case was tried to a jury.

The evidence of actual malice offered at the three-day trial was circumstantial in nature. With respect to the implication that he was attempting to conceal a criminal past and mislead the public, Coody presented evidence to demonstrate that Stokes had made a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of these charges. The evidence showed

that the editorial was published before Stokes conferred with his only source and before he received the private investigator's report. In addition, Coody offered evidence that Stokes possessed information that contradicted what he ultimately published in the editorial and that his reliance on the source as the basis for his comments in the news story was questionable, since she offered only her "impressions."

With regard to letter-writing campaign, evidence was presented to show that Stokes was openly hostile toward Coody, was determined to prevent him from being elected mayor, and had timed publication of the editorial and news story to achieve maximum impact on the election. There was also evidence suggesting the *Times* had a financial motive in discrediting Coody, who, as a city board member, had complained about the advertising rates that the newspaper had charged the city. This evidence was also relevant to the implication that Coody was a liar attempting to hide a criminal record.

The jury returned a verdict in Coody's favor, awarding him $275,000. Of that amount, $15,000 represented compensatory damages, $250,000 punitive damages against Thomson Newspapers, and $10,000 punitive damages against Stokes. In response to interrogatories, the jury specifically found that the statements about Coody were false and defamatory and had been published with actual malice. The circuit court entered a judgment in accordance with the verdict and denied a defense motion for JNOV in which the sufficiency of the evidence of actual malice was raised. (R. 727-46, 790-91).

The Supreme Court of Arkansas reversed, concluding that Coody had "not met his burden of proving actual malice by clear and convincing evidence." App. 12. Taking the letter-writing issue first, the Court noted that although Coody had testified that he did not conduct such a campaign, "there is no evidence that Stokes was aware that there was no campaign." *Id.* at 9.

Turning to the implication of prior criminal conduct and the accusation that Coody was misleading the public, the court focused on Stokes' source. "Although there are discrepancies [in the testimony] regarding when Stokes contacted [the source]," the court said, "there is no proof that Stokes entertained serious doubts as to the truth of his publication." *Id.* at 11 (internal quotation omitted). The court also suggested that the result would not be different if one accepted the source's testimony that she was not contacted until after the editorial was published. "[R]eckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing, but whether he, in fact, entertained serious doubts as to the truth. . . . *Id.* at 12.

With respect to evidence of Stokes' hostility toward Coody, the court pointed out that "ill will is admissible circumstantial evidence of actual malice." Despite such evidence, however, "the proof does not establish actual malice with convincing clarity." *Id.* at 11.

REASONS FOR GRANTING THE PETITION

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), Justice Stevens observed that "[w]e

have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures or elections." *Id.* at 688. By misapplying that decision in the instant case, however, the court below has as a practical matter done just that. Unfortunately, the Arkansas Supreme Court is not alone in experiencing difficulties with *Harte-Hanks*, and this case provides an excellent opportunity for this Court to revisit and clarify two related issues addressed in that decision: the scope of independent appellate review and the proof of actual malice.

A. THE LOWER COURTS ARE DIVIDED OVER THE PROPER SCOPE OF INDEPENDENT APPELLATE REVIEW IN LIBEL CASES

In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), this Court held that appellate courts must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. The *Harte-Hanks* decision, however, makes plain that credibility determinations are not reviewed independently on appeal, since "the trier of fact has had the opportunity to observe the demeanor of the witnesses." 491 U.S. at 688 (internal quotation omitted).

This Court also declined in *Harte-Hanks* to second-guess the jury's conclusions with regard to various subsidiary facts that were central to its ultimate finding of actual malice. Writing for the Court, Justice Stevens identified three subsidiary factual issues that were in dispute, noted that the jury "must have rejected" the defendant newspaper's position with respect to those issues, and considered the jury's apparent findings (along with

undisputed evidence) in holding that the newspaper had acted with actual malice. *Id.* at 690-91.

In a separate opinion, Justice Scalia described the majority's approach as follows:

> This analysis adopts the most significant element of the [method used in the Court of Appeals], since it accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony. Of course the Court examines the evidence . . . to determine that the jury could reasonably have reached that conclusion. But the Court does not purport to be exercising its own independent judgment as to [those fact questions].

Id. at 698.

The Chief Justice, as well as Justices Kennedy and White, described Justice Scalia's view as consistent with the majority opinion, which all three joined. *Id.* at 694 (concurring opinion of the Chief Justice, joined by Justice White) and 696 (concurring opinion of Justice Kennedy). As the Chief Justice observed:

> [I]n cases like this the historical facts – e.g., who did what to whom and when – are reviewable only under the clearly erroneous standard. . . . Credibility determinations fall in this category, as does the issue of knowledge of falsity. But . . . the reckless disregard component of the *New York Times Co. v. Sullivan* "actual malice" standard is not a question of historical fact. A trial court's determination of that issue therefore is to be reviewed independently by the appellate court.

Id. at 694.

Despite the *Harte-Hanks* decision, the lower courts are divided as to the proper scope of appellate review in defamation cases, even insofar as credibility findings are concerned. At one extreme is the Ninth Circuit's decision in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991), which holds that *Harte-Hanks* creates at most a "credibility exception" to the rule of independent appellate review. With respect to findings that involve the "weighing of evidence and drawing of inferences," the court said, the presumption of correctness "applies with less force" and the findings are subject to more intensive appellate scrutiny. *Id.* at 671. Under this approach, little deference is given to findings of subsidiary fact.[1]

Indeed, the *Newton* court did not bother to defer to some jury findings that turned on credibility. As one commentator has noted:

> The [court] expressed concern that the jury was biased in its verdict in favor of the [plaintiff, a "local hero"] and warned that "we cannot ignore the risk that a jury's credibility determinations may also subvert those [First Amendment] values." The court undertook an extensive recitation and review of the testimonial evidence and even singled out certain credibility determinations to which it was not willing to defer.

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[1] Other decisions reflecting such broad appellate review include *McCoy v. Hearst Corp.*, 227 Cal. App. 3d 1657, 278 Cal. Rptr. 596 (1991), *cert. denied*, 502 U.S. 1060 (1992), and *Lyons v. Rhode Island Public Employees Council*, 559 A.2d 130 (R.I.), *cert. denied*, 493 U.S. 892 (1989).

Driscoll, *The Scope of Independent Appellate Court Review in Public Person Libel Cases*, 14 Loyola Ent. L. J. 257, 275-76 (1994).

At the other end of the spectrum – and far more consistent with *Harte-Hanks* – is the Kentucky Supreme Court's decision in *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991). There the court flatly refused to exercise independent review with respect to subsidiary facts. After discussing *Harte-Hanks* at some length, the court said:

> At least in deciding what are the so-called underlying, subsidiary or historical facts, as contrasted with the finding of malice, where the evidence conflicts appellate review still must be in terms of what the jury could find as the true facts and what the jury could reasonably infer from the testimony of witnesses when considered as a whole. We accept the jury's finding as to disputed facts when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office, and we question the good judgment of any judge who thinks he has such special powers.

Id. at 688 (internal citation omitted).[2]

The instant case eschews the judicial restraint evident in *Ball v. E.W. Scripps* in favor of a level of appellate scrutiny that appears to go even further than the intrusive approach sanctioned by the Ninth Circuit in *Newton*.

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[2] Other cases reflecting this position include *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (W.Va. 1992), *cert. denied*, 113 S.Ct. 1384 (1993), and *Seropian v. Forman*, 652 So.2d 490 (Fla. App. 1995).

By substituting its own judgment for that of the jury with respect to credibility determinations as well as subsidiary facts, the Arkansas Supreme Court has shown little regard for jury findings of any type.

In terms of credibility, for example, the court recognized that "the jury apparently believed" Coody's testimony that "he did not tell Stokes who 'he should and should not listen to' in a conversation they had shortly after Stokes came to Fayetteville." App. 9. Nonetheless, the court chose to credit Stokes' account of the conversation. *Id.* Moreover, Coody testified that there had been no letters-to-the-editor "campaign" on behalf of his candidacy, and the jury plainly believed him. The court, however, dismissed this testimony as insufficient, since "there is no evidence that Stokes was aware that there was no campaign." *Id.* at 9. This is a back-handed way of saying that the jury erred in discrediting Stokes' testimony that he thought there was such an organized effort, largely on the basis of a single letter.

Had the court applied the approach taken in *Ball*, the jury, having chosen to disbelieve Stokes, was free to infer that he had no factual basis for his statement, in the October 31 editorial, that "there was some sort of 'set up' " regarding letters to the editor on Coody's behalf. This subsidiary fact – *i.e.*, that the defamatory statement was not grounded in fact – is one of many which, taken together, support the jury's ultimate conclusion that the offending material was published with actual malice.

In this respect, the instant case is quite similar to *Harte-Hanks*, in which the jury apparently rejected certain explanations offered by employees of the defendant

newspaper. This Court accepted the jury's apparent findings as true and considered them, along with other facts, in deciding whether there was adequate evidence of actual malice. 491 U.S. at 690-91. In sharp contrast, however, the Arkansas Supreme Court credited Stokes' explanation of the letter-writing charge – an explanation that the jury plainly rejected. This approach is tantamount to permitting a libel defendant to escape liability simply by testifying that he believed what he published to be true. Moreover, it effectively prohibits a libel plaintiff from proving actual malice via circumstantial evidence, as *Harte-Hanks* plainly allows.

The court also decided to credit Stokes' statement that he spoke with his source prior to publishing the editorial, despite the source's own testimony to the contrary. App. 10. Even under the two-tier approach of *Newton*, this discrepancy in the testimony would have been entitled to a strong presumption of correctness; obviously, the jury did not believe Stokes. If this subsidiary fact were taken into account, circumstantial evidence would exist as actual malice, since Stokes rushed the editorial into print on the weekend before the election without having spoken to his only source and without waiting for the report of his own private investigator.

In many respects, the instant case is similar to *Bressler v. Fortune Magazine*, 971 F.2d 1226 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1416 (1993), in which a divided Sixth Circuit panel reversed a $550,000 judgment in favor of a public official. In a strong dissent, Judge Batchelder took the majority to task for not giving the appropriate deference to the jury's credibility determinations. After reviewing the testimony, Judge Batchelder wrote:

> This Court is required to perform an independent review of the record in regard to actual malice to determine whether the plaintiff has proved actual malice by clear and convincing evidence. Where the record contains such evidence, to overturn the jury's finding of actual malice because there is also evidence to the contrary, without regard to the jury's right to disbelieve that contrary evidence unless it was clearly erroneous in doing so, is, in effect, to hold that the jury may not find actual malice unless there is no evidence in the record which, if believed, would support a finding of good faith. That is not the law.

Id. at 1256.

Petitioner urges this Court to take this opportunity to make unmistakably clear that Judge Batchelder and the Supreme Court of Kentucky are correct in their reading of *Harte-Hanks*. Appellate courts are simply not equipped to undertake independent review of subsidiary facts and credibility determinations, and to permit them to do so "would entirely displace the function of the jury in defamation cases." *Starkins v. Bateman*, 724 P.2d 1206, 1212 (Ariz. App. 1986).

B. THE DECISION BELOW CONFLICTS WITH THOSE OF THIS COURT AND OTHER COURTS REGARDING PROOF OF ACTUAL MALICE

At various points in its opinion in the instant case, the Supreme Court of Arkansas pointed out that the actual malice standard requires proof that the defendant

"entertained serious doubts as to the truth of his publication." *E.g.*, App. at 11, 12. This statement is correct, as far as it goes. However, the actual malice requirement is more complex, and the court's emphasis on this one aspect skewed its analysis and effectively deprived Petitioner of any opportunity to establish actual malice.

In *Harte-Hanks*, this Court reiterated that a public official or public figure must show that the defendant "entertained serious doubts as to the truth" and made clear that he may do so in two ways. First, he may establish the defendant's state of mind by evidence that the defendant "actually had a high degree of awareness of probable falsity." Second, he may show that the circumstances surrounding publication gave the defendant "obvious reasons to doubt the veracity of the informant or the accuracy of his reports" and that the defendant failed to take reasonable steps to dispel those doubts. 491 U.S. at 688.

Where there is proof of a "high degree of awareness of probable falsity," that alone will establish that the defendant in fact entertained "serious doubts" as to the truth. Where such direct proof is absent, the jury may infer from the circumstances that the publisher was aware of the falsity. It may do so, for example, if it finds that there were "obvious reasons" for the defendant to doubt the veracity of a source or the accuracy of a story and that the defendant did not act reasonably in dispelling those doubts. While failure to investigate will not alone support a finding of actual malice, "the purposeful avoidance of the truth is in a different category." *Id.* at 692.

The lower courts have long struggled with the actual malice rule in general and the "serious doubts" requirement in particular. Since *Harte-Hanks*, more difficulties have arisen as courts have had to distinguish between a mere "failure to investigate" on the one hand and "the purposeful avoidance of the truth" on the other. *See, e.g., Sweeney v. Prisoners' Legal Services of New York, Inc.*, 84 N.Y.2d 786, 622 N.Y.S.2d 896, 647 N.E.2d 101 (1995); *Brewer v. Rogers*, 439 S.E.2d 77 (Ga. App. 1993), *cert. denied*, 114 S.Ct. 2712 (1994).

These problems are compounded if courts are reluctant or unwilling to give much weight to circumstantial evidence, despite the clear statement in *Harte-Hanks* that such proof may be employed to demonstrate actual malice. That was the problem in the instant case. The Supreme Court of Arkansas failed to accord *any* weight to circumstantial evidence from which the jury could reasonably conclude that the offending articles were published with reckless disregard for the truth.

One example makes the point. The evidence showed that Stokes did not speak with his only source as to Coody's background before publishing the offending editorial and that he did not bother to wait for a report from the private investigator he had retained. Under these circumstances, the jury reasonably concluded that the editorial was based solely on rumors, of which Stokes was aware, that had been circulating in the community. In this situation, there were "obvious reasons" for Stokes to doubt the accuracy of the published information, particularly in light of the fact that Coody had provided the newspaper with contrary evidence in the form of official records. *See Masson v. The New Yorker Magazine, Inc.*, 960

F.2d 896, 900 (9th Cir. 1992); *Currier v. Western Newspapers, Inc.*, 855 P.2d 1351, 1354 (Ariz. 1993); *Stegall v. WTWV, Inc.*, 609 So.2d 348, 351 (Miss. 1992).[3]

From this evidence, the jury was entitled to infer that Thomson and Stokes were purposefully avoiding the truth because it did not advance their cause, *i.e.*, to ensure that Coody, an "anti-establishment" candidate who was leading in the polls, was defeated on election day. Circumstantial evidence that they did not care about the truth because it did not serve their purpose is surely sufficient under *Harte-Hanks* to establish reckless disregard.[4]

In sharp contrast to the instant case is *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (W.Va. 1992), *cert. denied*, 113 S.Ct. 1384 (1993). There the defendant newspaper, at

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[3] The same result follows even if one were to credit Stokes' testimony that he spoke with his source prior to publishing, for she offered only her "impressions," not factual information. Construing ambiguous statements in a manner that is most damaging to the plaintiff is evidence of reckless disregard for the truth. *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 773 (Ky. 1990), *cert. denied*, 498 U.S. 1047 (1991).

[4] The court's refusal to credit circumstantial evidence was not limited to this one instance. As noted previously, Coody claimed that the editorial falsely accused him of orchestrating a "set-up," *i.e.*, a letters-to-the-editor campaign on his behalf. While purporting to give little weight to Stokes' testimony that he believed this to be true, the court said that there was "no evidence that Stokes was aware that there was no [letter-writing] campaign." App. 9. Obviously, Coody was in no position to produce direct evidence on this point, since such "awareness" is within Stokes' exclusive control. *See Currier, supra*, 855 P.2d at 1355 ("Plaintiffs did not, and likely cannot, directly controvert [defendant's] bald assertion of subjective belief").

the insistence of its publisher, printed an editorial implying that the plaintiff, a lawyer who also held public office, had engaged in dishonest and unethical conduct. In finding clear and convincing evidence of actual malice, the court emphasized that the publisher, who tightly controlled the paper's editorial policy, "bore a strong animus towards lawyers in general and . . . regularly wrote editorials highly critical of lawyers and the legal profession." Additional circumstantial evidence could be found in the newspaper's "gross deviations from generally accepted standards of journalism." *See Harte-Hanks*, 491 U.S. at 667-68. Before the editorial was published, "no effort was made to contact [the plaintiff] to determine whether he had anything to say for himself that might make him look less reprehensible or might refute the facts alleged in the editorial." 423 S.E.2d at 577.

This Court and others have also taken into account evidence of actual malice that the Arkansas Supreme Court ignored in the case at bar. Such evidence includes:

– The defendant possessed information that contradicted what he ultimately published. *Harte-Hanks*, 491 U.S. at 690-91; *Goldwater v. Ginzburg*, 414 F.2d 324, 336 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

– The defendant did not conduct a complete investigation. *Harte-Hanks*, 491 U.S. at 685; *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315, 319 (Colo. 1981).

– The defendant relied on a questionable source for his information. *Harte-Hanks*, 491 U.S. at 692; *Herron v. KING Broadcasting Co.*, 746 P.2d 295, 303 (Wash. 1987), *on rehearing*, 776 P.2d 98 (Wash. 1989).

– The defendant had a financial motive in publishing the information. *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 843 (6th Cir. 1988), *aff'd*, 419 U.S. 657 (1989).

– The defendant held a particular point of view toward the subject. *Goldwater*, 414 F.2d at 328.

– The defendant supported the plaintiff's opponent in an election and sought to discredit the plaintiff in the eyes of voters. *Connaughton*, 842 F.2d at 843-44; *Goldwater*, 414 F.2d at 328-29, 337.

– The defendant timed publication of the story to achieve maximum impact. *Connaughton*, 842 F.2d at 844.

By disregarding such evidence and by taking an extremely rigid view of the "serious doubt" requirement, the court below made it virtually impossible for Petitioner to prevail. Other courts have also turned the actual malice rule into an insurmountable obstacle for public plaintiffs. This case thus presents an opportunity for this Court to refine the standard and strike an appropriate balance between reputational interests and First Amendment concerns. As Chief Justice Warren once observed, "[f]reedom of the press . . . does not include absolute license to destroy lives or careers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (concurring opinion).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

A. OPINION BELOW

The Supreme Court of Arkansas
320 Ark. 455, 896 S.W.2d 897

Thomson Newspaper Publishing Co., d/b/a Northwest Arkansas Times, and S.D. "Dave" Stokes, Individually and as Publisher of Northwest Arkansas Times, Appellants, v. Dan Coody, Appellee, No. 94-980.

May 8, 1995.

ANDREE LAYTON ROAF, Justice.

This appeal involves a libel action filed by appellee Dan Coody against the appellants, Thomson Newspaper Publishing, Inc., d/b/a *Northwest Arkansas Times* (*Times*), and S.D. "Dave" Stokes, individually and as publisher of the *Times*. A jury awarded Dan Coody $275,000.00 in compensatory and punitive damages. Appellants raise four points for our review: (1) appellee failed to submit any evidence of libel upon which the jury could base a verdict for appellee; (2) appellee failed to prove actual malice on the part of the appellants by clear and convincing evidence; (3) the trial court erred in allowing evidence of common law malice on the issue of constitutional malice; and (4) the trial court erred in allowing an award of compensatory damages to appellee based upon insufficient and speculative evidence. We hold that the evidence was insufficient to support a finding of actual malice and the judgment is accordingly reversed.

FACTS

Dan Coody and his spouse, Deborah, relocated to Fayetteville from Texas in 1987. The Coodys had been self-employed home builders in Texas and engaged in home remodeling and carpentry work after moving to Fayetteville. In November 1990, Coody was elected to a four-year term on the City Board of Directors of Fayetteville. Prior to his election, Coody had a strong interest in historical preservation and environmental issues and actively opposed such measures as the location of a bar next to an elementary school. After his election, he opposed the development of a new regional airport in the Bentonville area. In May 1992, Fayetteville voted to change its form of government from city manager to mayor-alderman effective January 1, 1993, and an election was to be held in November 1992 for the new mayoral and aldermanic positions.

Coody announced his decision to run for the position of mayor in August 1992. At the time of his announcement, appellant Dave Stokes was the publisher of the *Times* and had come to Fayetteville in September 1991 to assume this position. Coody had been openly critical of the *Times* and Stokes in the months prior to the election, questioning the paper's journalistic integrity and objectivity, and criticizing the relationship between Stokes and the local Chamber of Commerce. Coody had also attempted to divert the city's legal advertising away from the *Times* to a competing area newspaper.

During his campaign for mayor, Coody began hearing rumors that he was secretive about his past prior to moving to Fayetteville, because he had been involved in

criminal activities while in Texas. The rumored activities varied from armed robbery, writing hot checks, and conviction for a drug offense. It was also rumored that Coody was abusive to women. Coody paid a visit to Stokes' office in late September 1992 to inquire if Stokes had heard the rumors and to deny that he had ever been in trouble with the law. Stokes acknowledged hearing the rumors. Coody's offer to provide Stokes with information to repudiate the rumors was declined. Stokes stated that "[w]e have ways of finding these things out."

In late September, Coody wrote the Texas Department of Public Safety and the Arkansas State Police, submitting his full name, birthdate and fingerprints, and requested information regarding any felony or misdemeanor conviction. He received replies from both stating that no criminal records were found. Coody delivered copies of these replies to a reporter from the *Times* and also to the *Springdale Morning News*.

The election was scheduled for Tuesday, November 3, 1992. On Thursday, October 29, 1992, Stokes learned of a poll which showed that Coody was in the lead for the mayor's race. On Friday, October 30, 1992, one of Coody's opponents, Glenn Sowder, held a press conference and aired a recording of a message left by Coody on a telephone answering machine in which Coody, using profanity, complained about one of Sowder's supporters having accused him of being abusive to his wife and other women. On that same day, Stokes engaged a private investigator to delve into Coody's background in Texas. Stokes also claimed to have received information on Thursday, October 29, 1992, concerning Coody's criminal history from a Fayetteville resident who was Coody's

high school classmate in Beaumont, Texas; however, the informant testified that she was not contacted by Stokes until Monday, November 2, 1992, at the earliest.

On Saturday, October 31, 1992, the first of the two articles at issue in this case was published on the editorial page of the paper and attributed to Dave Stokes, publisher. The two column article was captioned in large, bold letters, "It's time for Coody's facade to come off," alleged Coody "set up" a letter writing campaign supporting his candidacy, and mentioned that the author had begun "hearing rumors about Coody" shortly after he declared for mayor but "did not give credence to these rumors," because of the desire to keep the campaign as clean as possible. The article stated that "it's time for the gloves to come off" and went on to accuse Coody of attempting to "mislead the public about who he is and what he stands for," and of exhibiting behavior which casts doubt on his ability to perform under stress. The article included a transcript of the telephone message left for Sowder by Coody with abbreviations and dashes for the profanity used and went on to question, "What's Coody so nervous about?" The article further accused Coody of attacking the newspaper and Stokes because he could not get his way and dictate what the paper printed, accused him of making slurs against Fayetteville, accused him of making accusations without substance in his capacity as councilman and then backing down when his hand was called, and concluded by stating that Coody's rhetoric about loyalties for Fayetteville is a "thin facade covering his real loyalty – to himself."

On Monday, November 2, 1992, Stokes received the private investigator's report which contained no adverse

information on Coody and Stokes also contacted the informant. Coody held a press conference on Monday and provided information regarding his background and work history and also published a full page ad in the *Times* to counter-act the effect of the "facade" article.

On Tuesday, November 3, the morning of the election, the *Times* ran the second article, an interview of Stokes, under the byline of reporter Rusty Garrett. The article was captioned "*Times* publisher defends probe into past of mayoral candidate." The article stated that Stokes had "taken a leading role" in researching the life and activities of Coody prior to his arrival in Fayetteville and admitted to the employment of a private investigator. The article quoted Stokes as stating he had "uncovered some major discrepancies between information contained in the [investigative] report and that he subsequently received from former Beaumont [Texas] residents who say they knew Coody in high school." Stokes further alleged that the investigation was necessary because Coody "continually refused to answer [questions about his past] throughout the campaign," and it was conducted to "get the real truth" concerning Coody. Stokes explained that a similar investigation was not conducted on the other four mayoral candidates because they "had not been the subject of rumors with the 'severity' of those circulated about Coody."

Stokes went on to state that the investigation revealed that Coody's early life was "very admirable," and he questioned why Coody had not used information concerning his activities in Texas in his campaign. Stokes stated that the probe failed to turn up any information on Coody's life between the mid 1970's and 1986 when he

moved to Fayetteville and that the report "had created more questions than it had answered." Stokes accused Coody of not providing details about his past or outlining his past year-by-year.

After losing the election, Coody filed an action for damages against appellants, alleging that the editorial and article published on October 31 and November 2, 1992, contained defamatory and libelous statements which were made with actual and common law malice. He asked for compensation for actual damages to his emotional well-being, personal dignity, disruption of relationships with friends and family, damage to business reputation, standing in the community, and public image, and also requested that punitive damages be awarded. Appellants appeal from the judgment entered in favor of Coody and from the order denying their motion for judgment notwithstanding the verdict. It is undisputed on appeal that Coody was a public figure.

A defamation action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Little Rock Newspapers v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983). Furthermore, "[a] public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false 'statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' " *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The Supreme Court has recognized that where the first amendment is involved, the appellate court is obligated to make an independent examination of the

whole record to make sure the judgment does not constitute a forbidden intrusion on the field of free expression. *Harte-Hanks, supra; Fuller v. Russell,* 311 Ark. 108, 842 S.W.2d 12 (1992). However, the heightened standard of appellate review applies only to review of the finding of actual malice, and not to the determination of libel. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485 (1984). The standard of review for the issue of defamation and other factual findings is whether the jury's verdict can be supported by substantial evidence. *Allred v. DeMuth,* 319 Ark. 62, 890 S.W.2d 578 (1994); *Little Rock Newspapers, supra.*

EVIDENCE OF LIBEL

The jury found, from a preponderance of the evidence, that stated or implied facts published by the appellants in the two articles, were defamatory and false. Coody's principal contention was that the articles accused him of concealing a criminal past and that he had proven by his own denial and the reports submitted by him from the Texas and Arkansas authorities that he had no such past. Because the articles did not specifically mention the nature of the rumors about Coody's past but instead indicated that he was misleading the public and had something to hide, his claim was one of defamation by innuendo. *See Pritchard v. Times Southwest Broadcasting,* 277 Ark. 458, 642 S.W.2d 877 (1982). Also, Coody contends the statements regarding the letter writing campaign, his attempts to control to whom the appellants should listen, and the allegations that he was attempting to mislead the public about who he was and what he stood for were defamatory comments on his fitness and

desirability as a mayoral candidate. *See Harte-Hanks, supra.*

For purposes of this case, we need not review the findings of the jury that the articles in question contained stated or implied facts which were defamatory and false. Appellee, as a public figure, had the additional burden of proving that such false statements were made with actual malice, and he has failed to meet this burden.

ACTUAL MALICE

This court must conduct an independent review to determine whether there was clear and convincing evidence that the statements were made with actual malice. *Harte-Hanks, supra; New York Times, supra.* The question of whether the evidence in the record is sufficient to support a finding of actual malice is a question of law. *Id.* In discussing the actual malice standard the court has recognized:

> [T]he plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
>
> . . . .
>
> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with

> such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> . . . .
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

Fuller v. Russell, 311 Ark. 108, 842 S.W.2d 12 (1992) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 728, 731, 732 (1968)).

At trial, Stokes testified he believed his statements to be true, but this is of little consequence in making the actual malice determination. *Id.* However, the appellee has failed to present convincing evidence of appellants' awareness of the probable falsity of the statements. Coody testified he did not conduct a letter writing campaign; however, there is no evidence that Stokes was aware that there was no campaign. Further, Coody testified he did not tell Stokes who "he should and should not listen to" in a conversation they had shortly after Stokes came to Fayetteville to assume the position as publisher of the *Times*. Based upon the verdict, the jury apparently believed that Coody, in fact, did not make such a statement to Stokes. However, in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Supreme Court examined the effect of an "inaccurate description of what Seligson [the author] had actually perceived." The Court noted that the "language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled

with ambiguities' and descriptive challenges for the writer." *Id.* The Court concluded that the choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.

Although *Bose, supra,* addressed the writer's opinion regarding the quality of a loudspeaker system, we find the principles discussed apply generally to a listener's perception. Thus, Stokes' perception, even though possibly mistaken, of a conversation which admittedly occurred must be protected. Coody's testimony of the event simply does not constitute clear and convincing evidence of actual malice.

As to the rumors and the assertions that Coody was misleading the public, the evidence does not support a finding of actual malice. The chronology of events surrounding the publication of the rumors is as follows: the testimony clearly established that rumors of Coody's alleged criminal past were circulating prior to October of 1992. Stokes testified he contacted the informant, Ms. Flynn, on the evening of October 29, and, as a result of that conversation, he decided to hire a private investigator. On Friday, October 30, 1992, Stokes hired a private investigator to research Coody's past. Stokes testified he received the investigator's report on Monday and he contacted the informant to verify her version.

Ms. Flynn, however, testified she did not remember talking to Stokes prior to the publication of the October 31 article. She testified that, to the best of her knowledge, she was first contacted on Monday, November 2. Ms. Flynn testified she told Stokes that she thought Coody

had a questionable, at best, reputation in high school. She believed Coody had been involved with the police, but she did not provide any specifics, and further stated that she informed Stokes these were merely her impressions because she did not have any factual information.

The appellee submits that although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is a different matter. *Harte-Hanks, supra.* However, there is no convincing proof that the appellants purposefully avoided the truth. Although there are discrepancies regarding when Stokes contacted Ms. Flynn, there is no proof that Stokes "entertained serious doubts as to the truth of his publication."

In addition, the appellee cites evidence that Stokes was "hostile" towards Coody. Other employees of the *Times* testified that Stokes was motivated by his desire not to see Dan Coody in office, that Stokes did not believe Coody was a good candidate, and that he believed he had something to hide. A former employee of the *Times* testified Stokes stated in June of 1992 that he thought Coody had been involved in illegal activities and he was going to hire a private investigator.

It has been recognized that ill will is admissible circumstantial evidence of actual malice. *Harte-Hanks, supra.* However, even though there is some circumstantial evidence, the proof does not establish actual malice with convincing clarity. Coody seems to argue that both the hiring of the investigator and then not waiting for his report is evidence of actual malice. Coody also points out that Stokes did not talk to Ms. Flynn prior to the October

31 article, because of her testimony that Stokes first contacted her on Monday, November 2. Nevertheless, reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing, but whether he, in fact, entertained serious doubts as to the truth of the publication. *Harte-Hanks, supra.* Appellee has simply not met his burden of proving actual malice by clear and convincing evidence.

CONSTITUTIONAL MALICE AND AWARD OF COMPENSATORY DAMAGES

For appellants' third and fourth points, they argue that the trial court erred in allowing evidence of common law malice on the issue of "constitutional malice," and that the trial court erred in allowing an award of compensatory damages based upon insufficient and speculative evidence. Because we reverse on the issue of actual malice, we do not address these issues.

Reversed and dismissed.

B. DENIAL OF PETITION FOR REHEARING

Office of the Clerk
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Arkansas Court of Appeals
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June 12, 1995

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RE: 94 00908 THOMSON NEWSPAPER PUB. INC
D/B/A NW ARK
TIMES ET AL v. DAN COODY

Gentlemen:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

Leslie W. Steen, Clerk

LWS:rh

cc: G. Alan Wooten
& J. Randall McGinnis
Kathleen Harness, Clerk
(#CIV93-4)